Texas A&M Law Review

Volume 2 | Issue 3 Article 6

2015

A Problem Lurking Just Below the Surface: The Need in Texas for Dormant Mineral Legislation

Terrell Fenner

COMMENTS

A PROBLEM LURKING JUST BELOW THE SURFACE: THE NEED IN TEXAS FOR DORMANT MINERAL LEGISLATION

By Terrell Fenner

ABSTRACT

A long history of oil and gas development in Texas has made the state the number one energy producer in the United States, and the bulk of that energy is produced from fuels acquired by drilling into the vast natural resources that sit below the state. As a side effect of this long history, it is common for the surface and mineral estates in Texas to be severed, and many severances happened several generations ago. This history has spread mineral interests between dozens of owners in some cases, many who are unknown and cannot be found. Absentee ownership has diluted the value of these fractionalized interests and has made use by their non-absentee counterparts more difficult.

Existing laws that have been used in the past to clear absentee owners from title have not been effective in the context of a severed mineral estate, as those laws evolved primarily to address surface interests, or to accomplish other purposes with only incidental effect on land titles.

This Comment discusses the inadequacy of the current methods used in Texas to remove absentee owners from mineral titles and illustrates the need for a more effective remedy. It then offers a dormant mineral act that suits the unique cultural and economic needs of Texas and addresses the growing fractionalization of Texas's mineral estates.

TABLE OF CONTENTS

I. INTRODUCTION

For about the last hundred years, a problem has been festering in Texas, just below the feet of its citizens. Growing exponentially each generation, it waits to reveal itself until the last possible moment, and when it is finally discovered, there is often little that can be done about it. This Comment discusses the sad state of the current remedies for—and one potential solution to—the problem known as fractionalization of mineral estates.

Dormant mineral acts, sometimes called mineral lapse acts, serve to clear title and remedy fractionalization of mineral interests. Despite areas that display severe fractionalization of mineral estates,[1] Texas does not have a dormant mineral act, or any other method to effectively handle the issue. This omission has resulted in diluted mineral titles and in some cases has hindered cotenants ability to market and develop their own interests.[2] As the number-one-producing state of crude oil and natural gas,[3] it is surprising that Texas relies on inefficient and ineffective methods of dealing with the uncertainties caused by landowners who cannot be located and who have not put their mineral interests to productive use. In light of the current issues, Texas should consider adopting a dormant mineral act to ameliorate the problem.

From the outset, it should be clear that this Comment is not proposing a method of attack on owners who *choose* not to develop their mineral interests. Instead, it proposes a solution to the absentee owners problem—those owners who cannot be identified and have let their mineral estate go unused because they are not aware that they own mineral interests and cannot be found.

After the discovery of oil in Texas, speculators purchased, severed, and divided mineral interests in the name of profit.[4] The boom, precipitated by the Spindletop Field around 1902, which produced 17.5 million barrels of oil annually, resulted in speculators pooling money to buy as many mineral acres as they could.[5] Many of these investments did not pay off, so the investors just moved on to the next

1. Telephone Interview with Jason Hughes, President, Polomsky Hughes & Assoc., L.L.C. (Jan. 15, 2014). Mr. Hughes, a Landman, recounted his experience with a particular twelve-acre tract of land in an east Texas county that was owned by a husband and wife in the mid-twenties. Both died intestate without children. They were the first of many of the interest owners who died intestate, and his title examination revealed that, currently, over 150 people have an interest in the minerals, and the majority of them could not be located. Leasing efforts were abandoned. He also stated that in certain Texas counties it was not uncommon for tracts to have over ten mineral interest owners, and many owners cannot be located, even after a diligent search. *Id.*

2. Hughes, *supra* note 1. Mr. Hughes stated that it is not uncommon for tracts with a high concentration of owners who cannot be found to be excluded from development. *Id.*

3. *Crude Oil Production*, U.S. ENERGY INFO. ADMIN. (2014), http://www.eia.gov/dnav/pet/pet_crd_crpdn_adc_mbbl_a.htm; *Monthly Natural Gas Gross Production Report,* U.S. ENERGY INFO. ADMIN. (Aug. 27, 2014), http://www.eia.gov/oil_gas/natural_gas/data_publications/eia914/eia914.html.

4. Mary G. Ramos, *Oil and Texas: A Cultural History*, TEX. ALMANAC, http://www.texasalmanac.com/topics/business/oil-and-texas-cultural-history (last visited Feb. 27, 2014).

5. Robert Wooster & Christine Moor Sanders, *Spindletop Oilfield,* HANDBOOK OF TEX. ONLINE (June 15, 2010), https://www.tshaonline.org/handbook/online/articles/dos03.

boomtown and tried again.[6] The unprofitable interests that the speculators bought were regularly forgotten, seldom sold, and often passed through intestacy.[7] The net result is that some areas display extreme fractionalization of the mineral estates.[8] Out of these divided interests, many owners do not even know that they hold title to valuable mineral estates,[9] as many of these interests were severed from the surface decades ago.[10]

This boom-and-bust pattern has occurred with some regularity in Texas and will likely continue. New oil and gas plays are continually being discovered, and existing basins are being revisited with the advent of new technology. In the last decade, the Barnett Shale, covering about fifteen counties,[11] the Eagle Ford Shale, covering at least twenty-six counties,[12] and the Permian Basin area have all seen a surge in drilling and development. These new booms have the potential to spread and exacerbate the already prevalent issues of mineral fractionalization to new highs.

This excessive fractionalization can retard development efforts, as business realities make developing without all mineral owners' participation especially unappealing. The Texas rule is that when a mineral owner produces minerals from common property without having secured the consent of his cotenants, that developing cotenant is accountable to the other cotenants for the value of the minerals taken less the necessary and reasonable cost of producing and marketing the minerals.[13] This means that the cotenant who does not participate in the development is entitled to his proportionate share of profits, after deducting development costs, of a producing well. However, the nonparticipating cotenant is not liable for his share of the costs of a dry hole.[14] These two rules, when taken together, result in a regime where a willing cotenant must bear the whole potential loss of failure, and this potential loss is only offset by *his share* of the gains of a profitable well. This presents a substantial obstacle to developing tracts of

6. Ronald W. Polston, *Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles*, 7 LAND & WATER L. REV. 73, 75 (1972).

7. *Id.*

8. Joshua Elias Teichman, Comment, *Dormant Mineral Acts and* Texaco, Inc. v. Short*: Undermining the Taking Clause*, 32 AM. U. L. REV. 157, 159 (1982).

9. Hughes, *supra* note 1.

10. *Id.* Mr. Hughes noted that, depending on the county, the initial severance usually occurred between the 1910s and 1930s. Within a county, he said the dates were fairly consistent, and a function of when an oil boom happened in the vicinity. *Id.*

11. Marc Airhart, *The Barnett Shale Gas Boom,* GEOLOGY.COM, http://geology.com/research/barnett-shale-gas.shtml (last visited Feb. 28, 2014).

12. Dan Vergano et al., *Texas Oil Still Booming*, Web illus. to *Oil! New Texas Boom Spawns Riches, Headache*, USA TODAY (Jan. 15, 2014, 9:37 P.M.), http://www.usatoday.com/story/news/nation/2014/01/15/texas-oil-boom-fracking/4481977/.

13. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965).

14. Neeley v. Intercity Mgmt. Corp., 732 S.W.2d 644, 646 (Tex. App.—Corpus Christi 1987, no writ).

land where there is a mineral owner who cannot be located and other owners are interested in developing the property.

Given the availability of a legal mechanism designed explicitly to handle mineral fractionalization, coupled with Texas's vast economic interest in developing oil and gas reserves, it seems counterintuitive that Texas has not enacted a dormant mineral act.

In this Comment, first the Author will give a summary of dormant mineral statutes generally. Then the Author will examine the shortcomings of the commonly available mechanisms in Texas of transferring mineral title from an unproductive owner to a productive one. These mechanisms were largely developed to address unproductive surface owners, and are inappropriate methods for disposing of unproductive mineral owners. Finally, the Author will propose a dormant mineral statute for Texas that allows productive owners to retain their mineral estates, identifies owners to facilitate transparency in title, and consolidates unproductive owners' interests in productive owners.

II. Dormant Mineral Acts Generally

Dormant mineral statutes are designed to ensure mineral estates are in the hands of owners who have an interest in them—interest in the colloquial, not the legal sense. That person might be an estate owner who has demonstrated that interest in some way, or the surface owner, who is interested by virtue of being servient to the mineral estate. A general formulation of a dormant mineral act may be, "A mineral interest that has not been 'used' in the last 20 years will revert to the owner of the surface tract that the minerals sit below."[15] These statutes condition retention of interest in a mineral estate on compliance with use requirements set out in the statute.[16] The uses that will preserve an interest in a mineral estate are predictable and generally include exploration, production, and paper transactions.[17]

States began experimenting with dormant mineral statutes in the 1970s, and the statutes were regularly challenged and struck down.[18] The climate changed, however, after the United States Supreme Court decided the seminal case of *Texaco, Inc. v. Short*.[19]

---

15. As a general example of a dormant mineral act, this example is not as nuanced as actual enacted dormant mineral acts, but serves as a useful illustration of the broad workings of these acts.

16. *See, e.g.*, N.D. Cent. Code Ann. § 38-18.1-03(1)(b) (West 2014); Ohio Rev. Code Ann. § 5301.56(B)(3)(c) (LexisNexis 2004).

17. *See, e.g.,* Neb. Rev. St. § 57-229 (2014).

18. *Dormant Minerals Acts and the Marcellus and Utica Shale Plays*, Jones Day 2 (Apr. 2013), http://www.jonesday.com/files/Publication/1b6be8ca-ea24-4af6-a9b9-da6385cf6f92/Presentation/PublicationAttachment/59cd6b32-2616-4e71-85ea-e44aa5ab354a/Dormant%20Minerals%20Acts.pdf.

19. Texaco, Inc. v. Short, 454 U.S. 516 (1982).

In 1982, the United States Supreme Court handed down its ruling on an Indiana dormant mineral act.[20] The Indiana statute provided that severed mineral estates would revert to the surface owner if unused for a period of twenty years.[21] Mineral owners who had not used their interests in the period provided could save their interests by filing a statement of claim in the recorder's office.[22] From the date of enactment, the statute also provided for a two-year grace period for owners of unused mineral interests to file the appropriate statement of claim to preserve their interests.[23] This statute was self-executing and, by its language, did not require any notice to a mineral owner when a lapse occurred.[24]

Texaco was a lessee of eleven lessors who had not used their mineral interests for twenty years or filed a statement of claim within the two-year grace period from the date of the enactment of the statute.[25]

The Indiana trial court found that the statute "deprived appellants of property without due process of law, and effected a taking of property without just compensation."[26] The Indiana Supreme Court reversed the trial court's decision.[27]

Texaco challenged the statute at the Supreme Court, primarily on takings and due process grounds.[28] After an initial, lengthy discussion on whether Indiana could enact the law, the Court rejected Texaco's challenges and upheld the act.[29]

The Court laid the framework used to pass takings muster in the discussion about Indiana's power to enact the statute. In that discussion, the Court asked, and answered in the affirmative, if a state could establish a statutory abandonment of a severed mineral estate.[30] The Court was not troubled that Indiana considered severed mineral estates equal to and entitled to the same protections as a fee simple estate in the surface.[31] "[T]he State has the power to condition permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[32]

After concluding that the severed mineral estates were statutorily abandoned because of nonuse, the Court concluded that the state had

20. *Id.* at 540 (upholding the constitutionality of IND. CODE §§ 32-5-11-1 to 32-5-11-8 (1976)).
21. *Id.* at 518.
22. *Id.* at 518–19.
23. *Id.*
24. *Id.*
25. *Id.* at 521.
26. *Id.* at 523.
27. *Id.*
28. *Id.* at 523.
29. *Id.* at 540.
30. *Id*. at 525–30.
31. *Id.* at 525–26.
32. *Id.* at 526.

not taken anything, and because of this, owed no compensation.[33] The owner's own action—or in this case, inaction—of failing to make use of the property or to file a savings claim in compliance with the statute, caused the loss of the property, not the action of the state.[34] At the end of the analysis, the Court also declared that the "requirement that an owner of a property interest that has not been used for [twenty] years must come forward and file a current statement of claim is not itself a 'taking.'"[35]

The due process challenge warranted a bit lengthier discussion. Texaco challenged the adequacy of the notice of the act given by the state, and the idea that its property interest could be extinguished without notice from the surface owner.[36]

In answering the question of how much notice the state was required to give its citizenry of the existence and requirements of the act, the Court took a stance deferential to the Indiana legislature.[37] The notice, the Court stated, had to "afford the citizenry a reasonable opportunity to familiarize itself with its terms and comply,"[38] but when the legislature establishes a grace period, a period after enactment but before the law becomes effective, the Court holds the period determined sufficient by them in high regard.[39] Based on this deference, and in accord with the Indiana Supreme Court, the Court held that the two-year grace period was constitutionally sufficient.[40]

The Court then dismissed the contention that the *surface owners* need to provide the mineral owners with notice of the lapse of the mineral estate.[41] The Court differentiated between the notice required for the self-executing feature of the statute, which was the subject of the grace period discussion, and the notice required to judicially determine if a lapse did occur.[42] While the Court acknowledged that the judicial determination of a lapse would require notice consistent with due process requirements,[43] requiring notice of the self-executing feature of the statute would be equivalent to stating that a self-executing statute without notice is unconstitutional.[44]

Finally, the Court disposed of an equal protection challenge relating to mineral owners with over ten interests in the county.[45] After re-

33. *Id.* at 530.
34. *Id.*
35. *Id.*
36. *Id.* at 531.
37. *Id.* at 532.
38. *Id.*
39. *Id.*
40. *Id.* at 532–33.
41. *Id*.
42. *Id.* at 533.
43. *Id.* at 534; Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
44. *Texaco*, 454 U.S. at 534.
45. *Id.* at 538–40.

jecting all of Texaco's constitutional challenges, the Court allowed the act to stand.[46]

Beyond simply vindicating the Indiana act, the Court's various holdings also provided future legislators and litigators a framework for drafting, attacking, and defending future dormant mineral acts.

III. Current "Solutions" and Their Infirmities

Standing alone, constitutionality is not a particularly compelling argument for adopting a dormant mineral act. If existing law sufficiently addresses an issue, additional laws muddy the waters. So then, it is imperative to convince ourselves that existing law does not adequately remedy the issue of excessive mineral fractionalization at the hands of unproductive owners.

The Texas Comptroller of Public Accountants reports that there is currently almost half-a-billion dollars in unclaimed oil and gas royalties in the state account.[47] This money represents a staggering number of mineral owners who cannot be located and are still in the mineral titles. Producing oil and gas wells without at least some owners that cannot be found are the minority,[48] and with development reaching new parts of Texas without a historic oil and gas industry, the problem is getting worse.[49] The oil and gas industry has seen nearly a threefold increase in unclaimed royalties in the last decade, and generational division of previously *worthless* mineral interests is a primary factor.[50] When you further consider that these figures underreport the true number of those owners, because it does not account for mineral estates that are not producing royalties, it becomes clear that absentee ownership of mineral interests is no small problem and every passing generation exponentiates the problem.

The common and statutory law have developed methods and mechanisms for divesting an owner of surface property or personal property who has allowed the property to sit for a prolonged time in disuse; however, these solutions have not proven to be of particular value in dealing with the unproductive mineral owner. The most apparent of these solutions is adverse possession. Further, tax liens serve to some effect of removing an unproductive surface owner from title.[51] Neither of these, however, is of much value for unproductive mineral owners. Similarly, common law abandonment is of little use in the real property context. Finally, statutory receiverships, designed

46. *Id.* at 540.

47. Jennifer Hiller, *Unclaimed Mineral Royalties Increasing,* San Antonio Express–News (Aug. 5, 2013, 1:15 P.M.), http://www.expressnews.com/news/energy/article/Unclaimed-mineral-royalties-increasing-4704339.php.

48. *Id.*

49. *Id.*

50. *Id.*

51. *See, e.g.*, Tex. Tax Code Ann. § 34.01 (West 2013).

to allow *development* of minerals when an owner cannot be located, are a temporary solution for owners interested in developing but serve no title-clearing functions.

A. *Adverse Possession*

First, let us examine adverse possession in Texas. Texas codified the requirements for adverse possession and established twenty-five-, ten-, five-, and three-year limitation periods, with increasingly stringent requirements for the adverse possessor.[52] The courts have interpreted these sections to require the possession be "actual, . . . visible, continuous, notorious, distinct, hostile (i.e., adverse), and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant."[53] Although the statutes do not explicitly apply to severed mineral estates, courts have implicitly approved of its use in this manner in numerous cases, conceptually, at least.[54]

Adverse possession of an unsevered mineral estate (one where the minerals and the surface have not been separated) can be accomplished by adverse possession of the surface.[55] The severed mineral estate, while theoretically subject to the same rule of law, must satisfy much more difficult—and more uncertain—evidentiary showings than what must be shown to establish a claim of adverse possession of the surface.[56]

Among the requirements that an adverse possessor must show to perfect title, the most troublesome in a severed-mineral-estate case is the element of actual possession. An adverse possessor of a surface estate can show actual possession of the surface by a wide range of means from fencing, to grazing cattle, to development.[57] Thus, an adverse possessor of the surface has a range of options reasonably accessible to him to perfect his title in the surface estate.

In the context of mineral estates, however, an adverse possessor has much more limited options to establish actual possession. "Something more" is demanded of the adverse possessor of a mineral estate in

52. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.021 to .028 (West 2013).

53. Rhodes v. Cahill, 802 S.W.2d 643, 645 (Tex. 1990).

54. *See, e.g.*, West v. Hapgood, 174 S.W.2d 963, 966 (Tex. 1943); Rio Bravo Oil Co. v. Staley Oil Co., 158 S.W.2d 293, 295 (Tex. 1942); Dennis v. McCasland, 97 S.W.2d 684, 686 (Tex. 1936).

55. Watkins v. Certain-Teed Prods. Corp., 231 S.W.2d 981, 984 (Tex. Civ. App.—Amarillo 1950, no writ) ("The rule is well established in Texas that an adverse entry upon the surface of land extends downward and includes title to the underlying minerals where at the time of entry there had been no severance of the mineral estate.").

56. Christopher M. Alspach, *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance*, 37 TEX. TECH L. REV. 1073, 1087 (2005) (discussing the many gaps and uncertainties in adverse possession law regarding mineral estates in Texas).

57. *See generally* Kazmir v. Benavides, 288 S.W.3d 557, 563 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Texas.[58] *NGP v. Pool* held that, to establish the "something more," to show actual possession of the severed mineral estate, drilling and production must occur.[59]

In *Lyles v. Dodge*, a party attempted to support an adverse possession claim against the record mineral owners of a tract of land.[60] The adverse possessors drilled a three-hundred-foot deep well in search of oil or water.[61] The adverse possessors did not find either substance.[62] Because the adverse possessors did not find any oil, there was not an actual possession to *begin* to run the limitation period for adverse possession.[63]

Case law explicitly laying out what a court demands to satisfy the requirements for a successful adverse possession of a mineral estate is sparse, likely because of the economic risk involved in developing a mineral estate without title. *Kirkpatrick v. Gulf* demonstrates just how much courts need to establish adverse possession of the mineral estate.[64] Gulf Oil drilled eight wells on 320 acres between February 11, 1926 and April 15, 1930.[65] In reviewing the facts, the court found that Gulf completed a dry hole on March 8, 1926, then another dry hole on April 13, 1927.[66] Gulf then drilled the third, fourth, and fifth wells, completed on August 26, 1927, March 25, 1928, and May 12, 1928, respectively.[67] The court's opinion does not make it clear whether these three wells were dry holes or producers.[68] Gulf's sixth well, completed September 7, 1928, and its seventh well, completed June 17, 1929, were both producing wells.[69] Gulf completed its eighth well on April 15, 1930, but again, the court is unclear on if it was a producing well.[70]

Based on Gulf's extensive operations, the court held that Gulf had obtained title to the minerals under the five-year adverse possession statute.[71] Although the court was not explicit in its reasoning in this decision, it is fair to say that *Gulf* establishes that an adverse possessor who engages in continuous drilling and production operations for the

58. Broughton v. Humble Oil & Ref. Co., 105 S.W.2d 480, 483 (Tex. Civ. App.—El Paso 1937, writ ref'd).

59. Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 193 (Tex. 2003).

60. Lyles v. Dodge, 228 S.W. 316, 316 (Tex. Civ. App.—Amarillo 1921, no writ).

61. *Id.*

62. *Id.*

63. *Id.* at 317.

64. Kilpatrick v. Gulf Prod. Co., 139 S.W.2d 653, 657 (Tex. Civ. App.—Beaumont, 1940, writ denied).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 657–58.

length of time required by statute can sustain an adverse possession claim in a mineral estate.[72]

Texas cases where less than continuous production established adverse possession of a severed mineral estate are sparse and lack clarity. Christopher Alspach, in his article *Adverse Possession of Severed Mineral Interests and the Need for Statutory Guidance*, has identified several cases that thoroughly illustrate the uncertainty of this middle ground of adverse possession of a severed mineral estate.[73] Suffice to say that Alspach spends around fifty pages discussing the various nuances of adverse possession of severed mineral estates before suggesting that the case law is so unclear that Texas needs statutory reform to properly handle claims of this type.[74]

Given a well now costs between four and fifteen million dollars,[75] coupled with uncertainty in the middle grounds of the case law, it is no wonder that few people are capable or willing to engage in activities that would result in adverse possession of mineral estates.

Making adverse possession even more difficult is the fact that the potential "adverse possessor" could likely be a cotenant mineral owner. In Texas, cotenants can enter the mineral estate by drilling for and developing oil or gas without consent of other cotenants, and even over other cotenants objections.[76] Because each cotenant has equal rights to develop the estate, the mere act of drilling and developing a well may not constitute notice of adverse possession by ouster.[77] Instead, to show ouster, a cotenant must act in an unmistakably hostile manner towards his cotenants.[78] While the act of drilling or developing may be sufficient to establish a claim of adverse possession by stranger to title, because cotenants have rights to property that strangers do not, the courts require more definite acts of ouster.[79]

The final shortcoming of adverse possession is that, even when an adverse possession of a mineral estate can be established, the context that it is likely to occur can result in an adverse possession of a fee simple determinable, more commonly known as a Texas oil and gas lease.[80] As discussed above, the cost of oil and gas development in Texas is prohibitively expensive and mineral owners who do want to

72. *See* Alspach, *supra* note 56, at 1095.

73. *See id.* at 1087–19.

74. *See id.* at 1085–20.

75. *See* Jared Anderson, *How Much Does a Shale Gas Well Cost? 'It Depends,'* CNBC (Aug. 8, 2013, 8:08 AM), http://www.cnbc.com/id/100946625; *Drilling Operations,* PETROSTRATEGIES, INC., http://www.petrostrategies.org/Learning_Center/drilling_operations.htm#Drilling Costs (last visited Feb. 27, 2014).

76. Willson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e.).

77. BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 70 (Tex. 2011).

78. *Id.*

79. *Id.*

80. Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 199 (Tex. 2003).

develop almost universally lease[81] their minerals to an oil company.[82] In *NGP v. Pool*, the Texas Supreme Court held that an oil company that held over after the termination of its lease for a period long enough to satisfy the adverse possession requirements did not adversely possess a fee simple.[83] Instead, the court reasoned that because the oil company was only peacefully possessing in a capacity consistent with an oil and gas lessee, a fee simple determinable was all that it was entitled to adversely possess.[84] This means that when the "lease" acquired by adverse possession expires, the mineral estate reverts fully to the owner, and the title has not been affected in any permanent manner.[85]

Based on the reasons above, a strong case can be made against the effectiveness of the mechanism of adverse possession as a method to get absentee owners out of title. The difficulty of establishing an adverse possession, the limitations on likely cotenant adverse possessors, and the potential outcome of an adverse possession accomplished by a lessee all tend to show that a better solution needs to be found.

B. *Other Methods*

Adverse possession is not the only title-clearing mechanism that is demonstrably less capable of handling mineral interests compared to surface interests. Property taxes, although not intended to function as title-clearing devices, ensure that if a surface owner vanishes, the neglected property will likely change hands. In time, the county will likely force a tax sale on the estate because of delinquent property taxes. Severed mineral interests, however, are seldom subject to this fate.[86]

While Texas law explicitly declares that producing and non-producing[87] minerals are taxable, the reality is that local governments seldom appraise small and non-producing mineral interests.[88] Small enough interests—those interests having a value of less than $500.00—may even be eligible for a tax exemption,[89] further insulating them from tax suits. Counties can choose not to assess taxes on small interests as a matter of expense.[90] The amount of labor that the county has to

81. *Id.* at 192.

82. Hughes, *supra* note 1. Mr. Hughes commented that in over a decade in the oil and gas business he had never heard of a mineral owner who did not have strong industry ties developing their own property.

83. *Natural Gas Pipeline*, 124 S.W.3d at 202.

84. *Id.*

85. *Id.*

86. Polston, *supra* note 6, at 76.

87. TEX. TAX CODE ANN. § 1.04(2)(D) (West 2013).

88. Polston, *supra* note 6, at 76; W. Everett DuPuy, *Clouds on Title*, 18 TEX. B.J. 275, 275 (1955).

89. TEX. TAX CODE ANN. § 11.146 (West 2013).

90. Shirley Norwood Jones, *Constitutional and Practical Problems in Legislation to Terminate Non-Productive Mineral Interests*, 3 MISS. C. L. REV. 175, 181–82 (1983).

expend to produce a thorough and accurate listing and appraisal of a county worth of mineral estates may not be a good investment for it.[91] Infrequent assessments and exemptions for the very interests at issue result in fewer sales of these interests.[92]

Yet another argument against the tax sale is that even if a mineral interest does make it to the auction block, anyone may purchase the interest.[93] While purchase by a stranger may alleviate the issue of the unknown owner, it does nothing to lessen the fractionalization but merely substitutes an unknown owner for a new, known one.[94]

Tax sales are not designed to be a title clearing mechanism and, not surprisingly, are not very effective.[95] Severely limited application and the primary goal of revenue collection, not tidy mineral titles, render these sales essentially useless in remedying the issue of excessive fractionalization of mineral estates.

Finally—if only because of the grounds that dormant mineral acts are sustained constitutionally—it should be noted that Texas mineral estates are not subject to *common-law* abandonment.[96] While personal property may be abandoned by an act of abandonment coupled with an intent to forsake,[97] the same act directed at a piece of real property, like a mineral estate,[98] will not cause the loss of title. Only a deed, judgment, or other means recognized by law will act to pass title in Texas.[99] Non-use of a freehold estate will not extinguish the estate.[100]

The only practical measure to *circumvent* an absentee owner's title and develop without his or her consent in Texas is a receivership lease.[101] This is a lease granted by a court-appointed receiver and entered into on behalf of the unknown owner or owners.[102] These receivership leases allow cotenants (or owners of neighboring tracts that must be pooled with a tract with an absentee owner) to develop in the

91. *Id.* at 181.

92. *Id.*

93. TEX. TAX CODE ANN. § 34.01(m) (West 2013).

94. Polston, *supra* note 6, at 76.

95. *Id.*

96. Rogers v. Ricane Enters, Inc., 772 S.W.2d 76, 80 (Tex. 1989); Ingram v. State, 261 S.W.3d 749, 754 (Tex. App.—Tyler 2008, no pet.).

97. Ingram, 261 S.W.3d at 753.

98. Pounds v. Jurgens, 296 S.W.3d 100, 107 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("In Texas, minerals in place are realty and, as such, are subject to ownership, severance, and sale.").

99. City of Corpus Christi v. McCarver, 275 S.W.2d 194, 196 (Tex. Civ. App.—San Antonio 1955) *rev'd on other grounds*, 284 S.W.2d 142 (Tex. 1955).

100. Hanks v. Magnolia Petroleum Co., 14 S.W.2d 348, 351 (Tex. Civ. App.—Eastland 1928) *aff'd*, 24 S.W.2d 5 (Tex. Comm'n App. 1930).

101. Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 TEX. L. REV. 129, 145 (1964).

102. *Id.*

short term, but do nothing to clear the title of the mineral estate long term.[103]

A receivership lease is acquired through a receivership proceeding as authorized by Texas Civil Practice and Remedy Code section 64.091.[104] The party seeking the receivership must allege that the unknown owner has not been located after a diligent search and the party seeking the receivership will suffer substantial damage or injury unless the receiver is appointed.[105] Upon appointment, a receiver must immediately execute an oil and gas lease for the property[106] on the same terms as an "ordinarily prudent man of business would exercise in the management of his own affairs."[107]

While receivership leases do allow development in spite of a missing owner, they are cumbersome, requiring litigation every time a lease is desired.[108] More importantly, receiverships serve no long-term title clearing purposes, as their effect is only temporary.[109]

Considering the above arguments, it seems safe to say that the current regime is inadequate to get absentee owners out of a mineral title. Remedies originally used in the surface context and remedies that were not developed to serve as title-clearing mechanisms have proven themselves impotent to resolve the fractionalization of Texas's mineral estates.

IV. A Potential Remedy

If the existing measures to fix excessive fractionalization have proven ineffective, and another method is available, there is a strong argument to be made that the new measure ought to be adopted. Several oil and gas producing states have chosen to adopt dormant mineral acts, and many commentators have endorsed them in literature.[110]

Dormant mineral acts are as varied as the policy concerns and state goals that motivate them. There are currently over twenty states that have some incarnation of a dormant mineral act.[111] The National Conference of Commissioners on Uniform State Laws drafted the Uniform Dormant Mineral Interests Act ("The Uniform Act") in an

103. *Id.*
104. Tex. Civ. Prac. & Rem. Code Ann. § 64.091 (West 2009).
105. § 64.091(c).
106. *Id.* § 64.091(f).
107. Morrow v. De Vitt, 160 S.W.2d 977, 985 (Tex. Civ. App.—Amarillo, 1942, writ ref'd w.o.m.).
108. Tex. Civ. Prac. & Rem. Code Ann. § 64.091 (2014).
109. *See supra* accompanying note 103.
110. *See* Polston, *supra* note 6; Anna H. Ruth, Mixon v. One Newco, Inc.: *A Look at Dormant Mineral Acts*, 6 J. Min. L. & Pol'y 119 (1991).
111. Phillip E. Norvell, *Dormancy Mineral Legislation: A Cure for the Malady or Another Affliction*, 16 E. Min. L. Inst. ch. 12, at 433 (1997), *available at* http://www.emlf.org/clientuploads/directory/whitepaper/Norvell_97.pdf.

attempt to create consistent dormant-mineral legislation across the several states,[112] but The Uniform Act has failed to take hold.[113]

In 2009, Representative Sid Miller of Erath County introduced House Bill 834 (HB 834), a proposed dormant mineral act, to the Texas House of Representatives.[114] The bill was immediately given to the Energy Resources Committee, and five years later it is still in legislative limbo.[115]

HB 834 varied drastically from The Uniform Act,[116] and these differences illustrate some of the ways that Texas oil and gas policy justify departures from The Uniform Act. Conversely, HB 834's five-year tenure in committee without any sign of advancement indicates that some of its provisions may not be in line with Texas's notions of property ownership.

The Uniform Act favors flexibility in its administration, perhaps to the point where the act lacks teeth. Allowing any owner's use to serve as use for other mineral owners,[117] anyone can file preservation notices for any owner,[118] and late recording of preservation notices to salvage a mineral interest after a surface owner has instituted a suit for title[119] are all evidence that The Uniform Act is drafted to explicitly limit its application and divest as few mineral owners of their estates as possible.

HB 834, on the other hand, is a rigid statute that leaves little room for error or nonuse of a mineral estate. A presumption of abandonment arises if a report of ownership is not filed within one year of the acquisition of a mineral interest,[120] and a surface owner can bring suit for declaratory judgment in as little as one year if the mineral owner does not record the report.[121] Further, there is virtually no provision that allows an owner to retain ownership of a nonproductive mineral interest for a period longer than ten years,[122] and the

112. UNIF. DORMANT MINERAL INTEREST ACT (1986), *available at* http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf.

113. *See* MD. CODE ANN., ENVIR. § 15-1203 (LexisNexis 2007). This is one of the few enacted dormant mineral acts that resembles the Uniform Dormant Mineral Interests Act enough to raise a strong implication that the state act was inspired by the Uniform Dormant Mineral Interests Act.

114. TEX. H.B. 834, 81st Leg., R.S. (2009).

115. TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=HB834 (last visited Feb. 27, 2014).

116. *Compare* TEX. H.B. 834, *with* UNIF. DORMANT MINERAL INTERESTS ACT (1986).

117. UNIF. DORMANT MINERAL INTERESTS ACT § 4(b)(1).

118. *Id.* § 5(b).

119. *Id.* § 6.

120. TEX. H.B. 834 § 30.005(a).

121. *Id.* §§ 30.003(a), .005(a), .006(b).

122. *See id.* § 30.002(5); *supra* text accompanying notes 79–87. The only way to preserve an unused interest is to pay taxes on the interests, but these taxes are seldom assessed. *See supra* text accompanying notes 79–87.

time for abandonment is short compared to most dormant mineral acts.[123]

HB 834's restrictive terms evidence a strong bias for developing oil and gas properties and reuniting surface and mineral estates. While The Uniform Act may be effective in preventing fractionalization from occurring in areas where it has not already become a problem, the Act is arguably not aggressive enough to remedy the longstanding effects of over a century of division like that exists in Texas. As such, this Comment proposes a statutory scheme that incorporates the desirable elements of both The Uniform Act and HB 834, often looking to the dormant mineral acts of other oil and gas producing states for guidance when the two acts differ. This amalgamation of the most appropriate parts of various dormant mineral acts likely can address the existing fractionalization, without undermining the strong notions of property ownership that exist in Texas.[124] With these goals in mind, consider The Proposed Act.

A. *The Proposed Act*

A Proposed Dormant Mineral Act

Section 1. Applicability.

This Act does not apply to any mineral interests owned by the United States or the State of Texas or an agency or political subdivision of the United States or the State of Texas, except to the extent permitted by federal or state law.

Section 2. Definitions.

In this Act:

(A) "Interest in the surface" means a fee interest, whether conditional or not, from which a mineral interest has been severed.

123. *Compare, e.g.*, MD. CODE ANN., ENVIR. § 15-1203 (LexisNexis Supp. 2013) (requiring twenty years for abandonment), CONN. GEN. STAT. ANN. § 47-33q (West 2009) (requiring twenty years for abandonment), *and* N.D. CENT. CODE § 38-18.1-02 (2014) (requiring twenty years for abandonment), *with* GA. CODE ANN. § 44-5-168 (2010) (requiring seven years of non-use raises presumption of adverse possession of minerals by surface owner, essentially a dormant mineral statute by another name).

124. *See generally, e.g.*, Christian Brooks, *Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Rights Preservation Act*, 33 TEX. TECH L. REV. 59 (2001); George E. Grimes, Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557 (1996); Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012); David A. Johnson, *One Step Forward, Two Steps Back: Construction of Restrictive Covenants After the Implementation of Section 202.003 of the Texas Property Code*, 32 TEX. TECH L. REV. 355 (2001) (demonstrating various aspects of Texas's general preference for strong individual property rights).

(B) "Mineral interest" means an interest in oil, gas, or other minerals in place that is severed from the ownership of an interest in the surface and includes a fee interest, whether conditional or not, life estate, estate for years, remainder interest, reversion, possibility of reverter, right of entry, executory interest, leasehold interest, royalty interest, executive right, or other present possessory interest, future interest, equitable interest, or concurrent ownership interest.

(C) "Surface owner" means a person who has concurrent or sole legal right or title to a present interest in real property from which a mineral interest has been severed, except the holder of a leasehold interest or an estate for years.

(D) "Use" of a mineral interest can occur by:

(1) Active mineral operations on or below the surface of the real property or other property unitized or pooled with the real property, including production, geophysical exploration, exploratory or developmental drilling, mining, exploitation, development, operations for injection, withdrawal, storage, or disposal of water, gas, or other fluid substances in connection with the interest;

(2) Payment of taxes of the mineral interest by the owner;

(3) Payment by the interest's owner of rentals or royalties for the purpose of delaying or enjoying the use of the interest;

(4) Recordation of an instrument that creates, reserves, or otherwise evidences a claim to or the continued existence of the mineral interest, including an instrument that transfers, leases, or divides the interest. Recordation of an instrument constitutes use of (i) any recorded interest owned by any person in any mineral that is the subject of the instrument, and (ii) any recorded mineral interest in the property owned by any party to the instrument;

(5) Recordation of a judgment or decree that makes specific reference to the mineral interest; or

(6) Recordation of a Report of Ownership of Mineral Interest pursuant to Section 3.

Section 3. Report of Ownership of Mineral Interest.

(A) A person who owns a mineral interest on the date of enactment of this Act must, within one year from the date of enact-

ment of this Act, file a Report of Mineral Ownership with the county clerk of the county that contains the interest. A person who acquires a mineral interest after the date of enactment of this Act must, within one year from the date the interest was acquired, file a Report of Mineral Ownership with the county clerk of the county in which the interest is located.

(B) An owner of a mineral interest may record at any time a report of ownership of mineral interest. The mineral interest is preserved in each county in which the report is recorded. A mineral interest is not abandoned if a report is recorded within ten (10) years prior to commencement of the action to terminate the mineral interest.

(C) The report may be executed by an owner of the mineral interest or by another person acting at the direction of the owner, including an owner who is under a disability or unable to assert a claim on the owner's own behalf.

(D) The report must be subscribed and acknowledged in the same manner as required for a deed and must contain the name of the owner of the mineral interest or other persons for whom the mineral interest is to be preserved, and must identify the mineral interest or part thereof to be preserved by one of the following means.

(1) A reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest. Notwithstanding anything to the contrary, a report recorded to satisfy the requirements of Section 3(A) must identify the mineral interest or part thereof to be preserved by a reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest.

(2) A reference generally and without specificity to any or all mineral interests of the owner in any real property situated in the county. The reference is not effective to preserve a particular mineral interest unless there is, in the county, in the name of the person claiming to be the owner of the interest, a report that identifies the interest with a reference to the location in the records of the instrument that creates, reserves, or otherwise evidences the interest or of the judgment or decree that confirms the interest, and one of the following: (i) a previously recorded instrument that

creates, reserves, or otherwise evidences that interest or (ii) a judgment or decree that confirms that interest.

Section 4. Recording of Records of Mineral Ownership.

On receipt of a Record of Mineral Ownership pursuant to Section 3, the county clerk shall record the report in separately maintained public record, and maintain that record in the same manner as required for deeds.

Section 5. Presumption of Abandonment on Failure to File Record of Mineral Ownership.

(A) An owner of a mineral interest who fails to file a report as required by Section 3(A) is presumed to have abandoned the interest, and title to the interest is presumed to belong to the owner or owners of the interest in the surface from which it was severed, with each owner owning the same share and the same type of ownership in the mineral interest as the person has in the surface.

(B) A mineral interest is not abandoned if the owner of the interest files a report under Section 3 before the court renders a judgment under Section 6 declaring the interest abandoned.

Section 6. Judicial Proceeding.

(A) A surface owner may request the court to declare a mineral interest abandoned by filing a petition for declaratory judgment in the district court of the county where the real property is located.

(B) The court may declare a mineral interest abandoned only if the interest has not been used in the ten (10) years prior, unless Section 5(A) raises the presumption of abandonment. The ten-year period does not begin to run before the date of enactment of this Act. No disability or lack of knowledge of any kind on the part of any person suspends the running of the ten (10) year period.

Section 7. Vesting of Title.

(A) If a court declares a mineral interest abandoned, title to the interest vests in the owner or owners of the interest in the surface from which it was severed, with each owner taking the same share and the same type of ownership in the mineral interest as the person has in the surface.

(B) A person who acquires title to a mineral interest in an abandonment proceeding under this chapter may record, in the same manner as a deed, a certified copy of the judgment as evidence of title.

B. *Analysis of the Proposed Act*

The primary aim of The Proposed Act is to efficiently reduce fractionalization by removing unknown and absentee owners with minimal collateral damage to owners that can be found without needlessly destabilizing the mineral interests of known owners. This is accomplished through broad use allowances, balanced by short abandonment times, aggressive burden shifts to the mineral owner, countered with easy rebuttals by the mineral owners, and several other contrasting provisions designed to ensure quick elimination of absentee owners while offering ample protection for known owners. Although incidentally, The Proposed Act would also ease examiners in determining mineral titles and revealing difficult-to-find owners.

Section 1 of The Proposed Act excludes operation of the act on mineral interests owned by the state or the federal government or any associated entities. Exclusions like this are common in dormant mineral acts, and similar limitations were included in both The Uniform Act and HB 834. Aside from obvious political and legal concerns, this exclusion also makes sense in light of the goal of a dormant mineral act.[125] The act is aimed at reducing instances of unproductive, absentee owners, and remedying the fractionalization that that type of ownership causes. As political entities do not die intestate, and can be reliably located in the event of potential development, it would serve none of the functions of the act to include them in the reach of The Proposed Act.[126]

Section 2 of The Proposed Act is the definitional section and mimics existing dormant mineral acts. The definition of "mineral interest," adopted from HB 834,[127] is drafted as broadly as possible and is clearly intended to reach any conceivable interests in a mineral estate. The definition of the mineral interests is drafted to only include interests in minerals that have already been severed from the surface,[128] avoiding a situation where an owner of both surface and minerals in a tract is subject to loss of title of his minerals under the act.

125. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-33p (West 2009); MD. CODE ANN., ENVIR. § 15-1202 (LexisNexis Supp. 2013); MICH. COMP. LAWS ANN. § 554.292 (West Supp. 2014).

126. *See* UNIF. DORMANT MINERAL INTEREST ACT § 3 cmt. (1986), *available at* http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf.

127. TEX. H.B. 834, 81st Leg., R.S. § 30.002(3) (2009).

128. *Supra* Part IV.A. The Proposed Act § 2(B).

"Surface Owner" is defined largely to delineate who may sue for declaratory judgment to have a mineral interest declared abandoned. This definition is a procedural machination and limits potential plaintiffs to those with present interest in the surface.[129]

The seemingly benign "interest in the surface" definition hides its importance. The definition circumscribes *any* fee interest in the surface—from fee simple absolute to a contingent remainder in fee simple determinable—and is later used in Section 7 to define whom the mineral interest vests to after a judicial finding of abandonment.

The final set of definitions establishes the activities that serve as "use" to evidence a lack of abandonment by a mineral owner. The "use" in Section 2(D)(1) is intended to encompass a wide range of operations, essentially ensuring that a mineral owner who is engaging in development of minerals is protected from loss. This definition modifies the "use" contemplated in The Uniform Act to include disposal and storage of fluid gases and other substances, uses explicitly exempted in The Uniform Act.[130] This deviation is supported by similar provisions in the dormant mineral acts of other major oil and gas producing states.[131] Further, HB 834 explicitly included a provision allowing injection operations to serve as use.[132]

Payment of taxes as use is an innocuous provision routinely included in dormant mineral acts,[133] as is the payment of rentals and royalties,[134] and both are included in HB 834,[135] while only the tax payment provision is in The Uniform Act.[136] Payment of taxes evidences that the owner has not abandoned his or her interest, and payment of royalties or rentals—even ignoring the strong implication that there are active operations (use in its own right) responsible for generating the royalties—implies the owner has a continuing interest in the minerals and has not abandoned them.

The next two uses are not found in HB 834, and are instead adopted from The Uniform Act.[137] While these uses are arguably redundant, as the recordation of an instrument or judgment that references an

129. *Supra* Part IV.A. The Proposed Act § 2(C).

130. UNIF. DORMANT MINERAL INTEREST ACT § 4(b)(1).

131. *See, e.g.*, N.D. CENT. CODE ANN. § 38-18.1-03(1)(b) (West 2014); OHIO REV. CODE ANN. § 5301.56 (B)(3)(c) (LexisNexis 2004).

132. Injection wells are a practical necessity in large oil and gas fields, mineral owners must consent to the use. The injection actions occupy the mineral interest to promote development, so this type of use seems justified in Texas.

133. *See, e.g.*, OHIO REV. CODE ANN. § 5301.56 (B)(3)(f); IND. CODE ANN. § 32-23-10-3(a)(6) (West 2013).

134. *See, e.g.*, IND. CODE ANN. § 32-23-10-3(a)(3); TEX. H.B. 834, 81st Leg., R.S. (2009).

135. TEX. H.B. § 30.002 (5)(C), (F).

136. UNIF. DORMANT MINERAL INTEREST ACT § 4(b)(2) (1986), *available at* http://www.uniformlaws.org/shared/docs/dormant%20mineral%20interests/udmia_final_86.pdf.

137. UNIF. DORMANT MINERAL INTEREST ACT § 4(b)(3)–(4).

interest would likely be considered a new acquisition to the parties and restart the time under Section 3, these broad uses ensure that owners who are cognizant of their interests do not lose them.

Finally, The Proposed Act explicitly treats the recording of a Report of Mineral Ownership as a use. No comparable provision was included in HB 834, but they are common in dormant mineral acts of other states.[138] Without a provision that allows for non-use, a dormant mineral act changes from a legal construct designed to remedy fractionalization and unknown owners to a statute that essentially requires an owner to develop a mineral interest or lose it. Though payment of taxes could save an unused mineral interest, as mentioned above, these taxes are only sporadically assessed, and so a provision specifically approving non-use is necessary to reliably allow unused interests to be preserved. Although Texas is a heavy oil and gas producing state, as noted above, the state also has a long history of promoting individual property rights. Couple that history with a litany of reasons why a mineral owner may not be developing the property (e.g., waiting for prices to go up, environmental concerns, no development opportunities in the area), and it becomes apparent that without a non-use provision, The Proposed Act would be squarely in the middle of a thorny policy debate between development and property rights. With the provision though, the act clearly points at unknown absentee owners.

Section 3 of The Proposed Act establishes the reporting requirements and procedures that a mineral owner must and may take to secure a mineral interest. The first paragraph adopts a novel provision from HB 834 that requires a mineral owner to record a Report of Mineral Ownership within one year from acquiring the interest (or one year from the date the act goes into effect).[139] The consequences of failure to record are discussed more thoroughly in the analysis of Section 4.

This section also authorizes a mineral owner to file a report anytime, with the report acting as use of the mineral interest, as elaborated on in the previous section.

Paragraph (C) and (D) give the procedural requirements of the report.[140] Paragraph (C) is a stripped down version of its very liberal counterpart contained in The Uniform Act.[141] The Proposed Act re-

138. *E.g.*, WASH. REV. CODE ANN. § 78.22.030 (West 2005); MICH. COMP. LAWS ANN. § 554.292 (West Supp. 2014); MD. CODE ANN., ENVIR. § 15-1204 (LexisNexis Supp. 2013).

139. *Compare* Tex. H.B. 834 § 30.003(a), *with, e.g.*, *supra* Part IV.A. The Proposed Act § 3(A), *and* N.D. CENT. CODE ANN. § 38-18.1-01 to 38-18.1-08 (West 2014). In fact, no enacted dormant mineral acts contained a provision even remotely similar in substance or effect.

140. *See supra* Part IV.A. The Proposed Act § 3(C)–(D).

141. *Compare supra* Part IV.A. The Proposed Act § 3(C), *with* UNIF. DORMANT MINERAL INTEREST ACT § 5(b).

quires an owner or a party acting *at the direction of the owner* to record a report. The Uniform Act allows virtually anyone to file a comparable report to preserve an interest for themselves or on behalf of any and all other owners, even unknown owners that can be identified by class.[142] The Proposed Act would not be alone in rejecting such broad allowances in recording reports that prevent abandonment,[143] and allowing the same would certainly undermine the goal of reducing fractionalization caused by unknown absentee owners.

While paragraph (C) maintains fairly rigid requirements as to who can record, paragraph (D) follows the lead of The Uniform Act in allowing a mineral owner to record a general blanket report covering any interest in the county that the report is filed,[144] assuming the interest has been reported with specificity previously. On acquisition, an owner must record an initial report that identifies the interest by reference to the instrument or decree that vested the interest,[145] but thereafter can save any interests in a county with one report, so long as the chain of title clearly demonstrates ownership.[146] Allowing these blanket notices is a "practical necessity"[147] for owners that own a large number of tracts in a county and is a clear convenience for all mineral owners who wish to preserve their interests. States that have adopted dormant mineral acts influenced by The Uniform Act have regularly retained this allowance.[148]

Section 4 is a procedural tool, inspired by Indiana's dormant mineral act and HB 834.[149] Accurately described as best practices, it requires the county to maintain a separate set of books and indexes for the reports. An overwhelming majority of enacted dormant mineral acts do not explicitly include a similar provision,[150] and the provision probably does not contribute directly to the overall goal of reducing fractionalization. However, the clear tangential benefits—e.g., easing title examination and reducing clutter in the deed records—justify its inclusion.

Section 5 is perhaps the clearest expression of the fact that The Proposed Act aims at absentee and unknown owners, instead of those

142. UNIF. DORMANT MINERAL INTEREST ACT § 5(b).

143. *See, e.g.,* N.D. CENT. CODE ANN. § 38-18.1-04 (West 2014) (requiring the report to be filed by the owner or the owner's representative).

144. *Compare supra* Part IV.A. The Proposed Act § 3(D)(2), *with* UNIF. DORMANT MINERAL INTEREST ACT § 5(c)(3).

145. *See supra* Part IV.A. The Proposed Act § 3(D)(1).

146. *See supra* Part IV.A. The Proposed Act § 3(D)(2).

147. UNIF. DORMANT MINERAL INTEREST ACT § 5(c)(3) cmt.

148. *See, e.g.*, MD. CODE ANN., ENVIR. § 15-1204(c)(4) (LexisNexis Supp. 2013).

149. *See* IND. CODE ANN. § 32-23-10-7 (West 2013); TEX. H.B. 834, 81st Leg., R.S. (2009).

150. *See, e.g.*, N.D. CENT. CODE ANN. § 38-18.1-01 to -08 (West 2014); OHIO REV. CODE ANN. § 5301.56 (LexisNexis 2004). A search of all known dormant mineral acts only revealed one state, Indiana, required a separate set of records. *See* IND. CODE ANN. § 32-23-10-7.

who have not developed their minerals. Modeled on the novel section 30.005 of HB 834, this section of the act raises a rebuttable presumption of abandonment of a mineral interest if the owner does not file a report as required by Section 3(A) and allows a mineral owner to conclusively rebut a finding of abandonment by filing a report pursuant to Section 3 prior to judgment.[151] The dichotomy between severe consequences for failure to record and complete "forgiveness" if recording occurs should serve to maintain the meaningfulness of the records. It also supports the assertion that the Act only targets owners that have failed to maintain familiarity with their property, as anyone who knows about a proceeding may defeat it by simply recording a report, while a safe presumption exists that most of the losers under the act will lose because they are absent from the property.

Section 6 addresses the procedural components of terminating an abandoned mineral interest. The Proposed Act, unlike the Indiana dormant mineral act challenged in *Texaco v. Short*, is not a self-executing statute and requires a surface owner to seek a court order to terminate the interest. Although the Indiana statute was upheld, most modern dormant mineral acts err on the side of caution and completely avoid this due-process challenge. Instead, The Proposed Act requires court intervention—along with the accompanying notice that it entails[152]—before declaring an interest terminated.[153] Section 6 also defines the time required for abandonment, assuming a presumption is not raised by Section 5, as ten years, a comparatively short time period.[154] Further, in an effort to reduce the justiciable questions in these proceedings, Section 6 does not toll the ten-year period, a common provision in enacted dormant mineral acts of other states.[155]

Finally, Section 7 describes how an abandoned mineral interest is dispersed. Title to the interest does not go to "surface owners" but to "owners of the interest in the surface."[156] This wording is not mere semantics, because The Proposed Act defines both terms.[157] The Proposed Act is explicit that any person who owns an interest in the fee of the surface takes according to his or her proportionate share and type of ownership. So someone with half of the fee simple title to the surface would receive one-half of the abandoned mineral interest in

151. *Supra* Part IV.A. The Proposed Act § 5.

152. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950).

153. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-33q (West 2009); N.D. CENT. CODE ANN. § 38-18.1-06.1.

154. *See, e.g.*, MD. CODE ANN., ENVIR. § 15-1203 (LexisNexis Supp. 2013) (twenty years for abandonment); CONN. GEN. STAT. ANN. § 47-33q (twenty years for abandonment); N.D. CENT. CODE ANN. § 38-18.1-02 (twenty years for abandonment). *But see* GA. CODE ANN. § 44-5-168 (2010) (seven years of non-use raises presumption of adverse possession of minerals by surface owner, essentially a dormant mineral statute by another name).

155. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-33q(a).

156. *Supra* Part IV.A. The Proposed Act § 7(A).

157. *Supra* Part IV.A. The Proposed Act § 2.

fee simple, while an owner of a contingent remainder of one-quarter of the fee interest in the surface would take a contingent remainder of one-quarter of the fee interest of the abandoned mineral interest.[158] This clear expression of who takes what is present in some, but not all, enacted dormant mineral acts and attempts to reduce tangential litigation in proceedings under The Proposed Act.[159]

Each individual section of The Proposed Act, viewed in isolation, looks familiar, as the act takes cues from existing dormant mineral acts. As a whole, the act is something new. What makes The Proposed Act effective and appropriate for the needs of Texas is the subtle balance of point and counter point. This internal tension allows for quick termination of legitimately abandoned interests, and readily available protections for unabandoned interests.

V. Conclusion

Dormant mineral acts are interesting statutory creatures, and legislatures that choose to enact them have wide latitude in shaping an act that best fits the needs and culture of the enacting state. If a dormant mineral act is adopted near the time that mineral severances become common, even a weak act, like The Uniform Act, can keep fractionalization in check. Texas, however, does not have that luxury. Early development encouraged early severances, many as far back as one hundred years or more. A century of unchecked division, devise, and inheritance has spread mineral interests among too many people. As a counterpoint, though, Texas still conforms to a political culture that champions individual property rights and loathes governmental intrusion into these rights. Any attempt at confronting the fractionalization issue must strike a delicate balance between efficiency and respect for these values.

Existing law only incidentally—and not particularly effectively—addresses the issue. For most cases where a person owns a piece of property that has been neglected for a long period of time, existing law is perfectly suited for finding it a new and willing owner. Adverse possession of surface estates and unsevered mineral estates, while fact sensitive, is well settled as a matter of law. Tax sales and other legal constructs also function competently on these properties. In the context of the severed mineral estate, though, these tools have proven themselves less than capable.

Dormant mineral acts, however, are designed explicitly to function on severed mineral estates. The difficulty in Texas is that such an act, if not crafted with sufficient protections for individual property rights,

158. *Supra* Part IV.A. The Proposed Act § 5(A).

159. *Compare, e.g.*, Md. Code Ann., Envir. § 15-1203(d)(2) (stating clearly surface owners take proportionately and in same type), *with* Ind. Code Ann. § 32-23-10-2 (West 2013) (stating that the interest reverts to the owner of the interest out of which the interest was carved, without specificity).

may never survive the political process. Fortunately, Texas does not have to reinvent the wheel and can instead look to the diverse group of acts that currently exist for guidance in producing a dormant mineral act that aggressively terminates interests that ought to be disposed of, while subjecting the other interest owners to minimal burdens. The Proposed Act offered in this Comment is one such iteration of a statute that satisfies those criteria. And while this Comment does not suppose that The Proposed Act, or even a dormant mineral act generally, is the only solution to the current trend of fractionalization, the nature of the issue and the demonstrable ineffectiveness of the current framework suggest that The Proposed Act, or a similar act, should at least be given serious consideration.